MOTION FILED
JAN 26 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL
PASSENGER FISHING VESSEL ASSOCIATION, *et al.*,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NEZ PERCE TRIBE OF IDAHO IN SUPPORT OF THE UNITED STATES AND RESPONDENT INDIAN TRIBES

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

ROBERT E. STROM
120 West Main
Craigmont, Idaho 83523

Attorneys for Amicus Curiae.

Of Counsel:
W. RICHARD WEST, JR.
LEROY W. WILDER

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* 1

INTEREST OF *AMICUS CURIAE* 5

STATEMENT OF THE CASE 8

SUMMARY OF ARGUMENT 13

ARGUMENT:

I. Under Established Principles of Law, the Off-Reservation Fishing Right Reserved by the Indians May Not Be Limited to a Mere Right of Equal Access to Their Traditional Fishing Sites 14

A. The Supreme Court consistently has blocked attempts by non-treaty agencies and individuals to limit the off-reservation fishing right of the Washington Indians 15

B. The meaning attributed by the State to the treaty provision concerning off-reservation fishing violates well-recognized principles of Indian treaty construction 16

II. The State of Washington's Discriminatory Regulation of the Indians' Off-Reservation Treaty Fishing Requires Allocation of the Harvestable Fish To Protect the Treaty Right 19

A. State fishing regulations cannot discriminate against off-reservation treaty fishing rights, and may affect those rights only when necessary to conserve the resource 19

B. When State regulations conflict with treaty rights, allocation of the harvestable catch is a necessary and appropriate remedy 22

III. An Allocation of 50% of the Harvestable Catch to Treaty Indians Does Not Violate the Constitutional Principle of Equal Protection of the Laws 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases:

Antoine v. Washington, 420 U.S. 194 (1975) 15,16,18,20

Caskey Baking Co. v. Commonwealth of Virginia, 313 U.S. 117 (1941) 26

Choate v. Trapp, 224 U.S. 665 (1912) 18

Choctaw Nation v. United States, 119 U.S. 1 (1886) 14,15

Cunningham v. United States, 256 F.2d 467 (5th Cir. 1958) 26

Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) 9, 20, 22

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 20

Morton v. Mancari, 417 U.S. 535 (1974) 27

Omaha Indian Tribe v. Wilson, 575 F.2d 620 (8th Cir. 1978), cert. granted 47 U.S.L.W. 3332 (U.S. S.Ct., Nov. 13, 1778) 27

Puget Sound Gillnetters Association v. Moos, 88 Wash. 2d 677, 565 P.2d 1373 (1977)..... 11

Puget Sound Gillnetters Ass'n v. District Court, 573 F.2d 1123 (9th Cir. 1978) 12

Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) 9,15,16,19,20

Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) 9,22,23

Regents of the University of California v. Bakke, ___ U.S. ___, 57 L. Ed. 2d 750 (1978).....27

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975)..... 18

Seufert Bros Co. v. United States, 249 U.S. 194 (1919) 15

Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969) 2,6,10,23

Tulee v. Washington, 315 U.S. 681 (1942)..... 9,15,20

United States v. Oregon, 529 F.2d 570 (9th Cir. 1976) 2,6

Cases, continued: Page

United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974)..... *passim*

United States v. Washington, 520 F.2d 676 (9th Cir. 1976) 9,21

United States v. Winans, 198 U.S. 377 (1905) ..... *passim*

Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (1977) 11,24

Treaties:

Treaty of June 9, 1855, 12 Stat. 951 6

Treaty of Medicine Creek, December 26, 1854, Art. III, 10 Stat. 1132 8

Miscellaneous:

United States Constitution 24-27

A Plan for Managing Fisheries in Stocks Originating from the Columbia River and Its Tributaries Above Bonneville Dam 2,6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL
PASSENGER FISHING VESSEL ASSOCIATION, *et al.*,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42(3), the Nez Perce Tribe, a federally recognized Indian tribe, moves the Court for leave to file the attached brief *amicus curiae* in support of respondent Indian tribes in the above-captioned cases. The

respondent Indian tribes, the United States and petitioner State of Washington have consented to the filing of this brief; the petitioners Puget Sound Gillnetters Association, *et al.*, Purse Seine Vessel Owners Association, *et al.* and respondent Washington State Commercial Passenger Fishing Vessel Association have refused so to consent.

The Nez Perce Tribe of the Nez Perce Reservation in Idaho entered into a treaty with the United States in 1855 in which it reserved an off-reservation fishing right in the Columbia River identical in purpose and scope to the treaty rights that are the subject of this review. Treaty of June 9, 1855, 12 Stat. 951. In litigation to which the Nez Perce Tribe was a party, along with a number of other tribes with fishing rights on the Columbia River, the federal district court in Oregon issued an opinion and order securing 50% of the Spring Chinook Salmon run to the treaty Indians and the remainder to the non-treaty fishermen in the states of Oregon and Washington. The decision, but not the order, is reported as *Sohappy v. Smith,* 302 F. Supp. 899 (D. Ore. 1969). The ruling and order were upheld in *United States v. Oregon,* 529 F.2d 570 (9th Cir. 1976).

At the present time the tribes, the State of Oregon and, ironically, also the State of Washington are operating under a bilateral agreement entitled "A Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries Above Bonneville Dam." The plan, *inter alia,* allocates all anadromous fish in the Columbia River among the parties and has been in successful, as well as amicable, operation for several years.

Because of the existing agreement which guarantees to the Nez Perce Tribe the full measure of its treaty right, these cases present issues which are of great and continuing concern to the Tribe. Simply stated, the treaty construction advanced by the State of Washington, if adopted by the Court, undoubtedly would have the effect of undercutting the fishing right now enjoyed by the Nez Perce Tribe.

Indeed, if Judge Boldt's allocation order is struck down, the legal basis for the present operating agreement between the Columbia River tribes and the States will be substantially diminished and thus future implementation of its provisions may be jeopardized. Similarly, the equal protection arguments advanced by non-treaty fishermen in the present cases, if adopted by the Court, will provide a justification for the State of Washington to repudiate the agreement.

Each of the foregoing issues, therefore, is addressed by the Nez Perce Tribe in the attached *amicus curiae* brief. Specifically, the brief is offered to assist the Court in recognizing that: (1) the treaty provision reserving off-reservation fishing rights to the Indians may not be limited to mere protection of "access" to traditional fishing sites; (2) the State of Washington's authority to regulate fishing for conservation purposes may not be invoked to eliminate the Indians' unique treaty fishing right and if enforcement of State regulations does discriminate against the treaty right, allocation of the fish between treaty and non-treaty users is necessary and appropriate; and (3) allocation of 50% of the harvestable catch to the treaty Indians does not violate concepts of

equal protection. Since these issues are of critical significance to the Nez Perce Tribe, and since such discussion may be helpful to the Court, the Tribe requests that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Suite 1000
Washington, D.C. 20037

ROBERT C. STROM
120 West Main
Craigmont, Idaho 83523
Attorneys for Amicus Curiae.

Of Counsel:
W. RICHARD WEST, JR.
LEROY W. WILDER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *et al.*,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE NEZ PERCE TRIBE OF IDAHO IN SUPPORT OF THE UNITED STATES AND RESPONDENT INDIAN TRIBES

INTEREST OF *AMICUS CURIAE*

The Nez Perce Tribe of Idaho is a federally recognized tribe of American Indians which occupies and governs the Nez Perce Reservation in the State of Idaho. The Tribe

entered into a treaty with the United States in 1855 in which it reserved an off-reservation fishing right in the Columbia River identical in purpose and scope to the treaty rights that are the subject of this review. Treaty of June 9, 1855, 12 Stat. 951.

In litigation to which the Nez Perce Tribe was a party, along with a number of other tribes with fishing rights on the Columbia River, the federal district court in Oregon issued an opinion and order securing 50% of the Spring Chinook Salmon run to the treaty Indians and the remainder to the non-treaty fishermen in the states of Oregon and Washington. The decision, but not the order, is reported as *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969). The ruling and order were upheld in *United States v. Oregon*, 529 F.2d 570 (9th Cir. 1976).

In marked contrast to the reaction of the State of Washington to Judge Boldt's orders in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), the State of Oregon has complied with the decisions of the lower courts in the *Oregon* and *Sohappy* cases. At the present time the tribes, the State of Oregon, and, ironically, also the State of Washington are operating under a bilateral agreement entitled "A Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries Above Bonneville Dam." The plan, *inter alia*, allocates all anadromous fish in the Columbia River among the parties and has been in successful, as well as amicable, operation for several years.[1] As testimony to the validity and success of the arrangement, the State of Oregon has not seen fit to file a brief *amicus curiae* in this case in support of the State of Washington.

[1] Rather than a precise 50/50 split of salmon, however, the Indians take only 40% of the Spring Chinook run and 60% of the Fall run.

Because of the existing agreement which guarantees to the Nez Perce Tribe the full measure of its treaty right, these cases present issues which are of great and continuing concern to the Tribe. Simply stated, the treaty construction advanced by the State of Washington, if adopted by the Court, undoubtedly would have the effect of undercutting the same fishing right now enjoyed by the Nez Perce Tribe. Indeed, if Judge Boldt's allocation order is struck down, the legal basis for the present operating agreement between the States of Oregon and Washington and the Columbia River tribes will be diminished and thus the future implementation of its provisions may be jeopardized. Similarly, the equal protection arguments advanced by non-treaty fishermen in the present cases, if adopted by the Court, will provide a justification for the State of Washington to repudiate the agreement.

Each of the foregoing issues, therefore, is addressed by the Nez Perce Tribe. Specifically, the following brief is offered to assist the Court in recognizing that: (1) the treaty provision reserving off-reservation fishing rights to the Indians may not be limited to mere protection of "access" to traditional fishing sites; (2) the State of Washington's authority to regulate fishing for conservation purposes may not be invoked to eliminate the Indians' unique treaty fishing right and, if enforcement of State regulations does discriminate against the treaty right, allocation of the fish between treaty and non-treaty users is necessary and appropriate; and (3) allocation of 50% of the harvestable catch to the treaty Indians does not violate concepts of equal protection of the laws.

STATEMENT OF THE CASE

The amicus curiae adopts the full statement of the case presented by the United States in its brief on the merits. A summary of the proceedings necessary to consider the arguments presented by *amicus curiae* is set forth below.

The cases before the Court derive directly or indirectly from an action filed in 1970 by the United States as trustee for several western Washington Indian tribes. Other tribes subsequently intervened in the action bringing the total number of tribes involved to 14. The complaint alleged, *inter alia*, that the State of Washington's regulation of its fisheries was destroying the tribes' off-reservation treaty fishing rights. The rights were secured to the tribes when, in granting vast areas of their territory to the United States in the mid-nineteenth century, they reserved the right to take fish at their "usual and accustomed" places off their reservations "in common with" other citizens.[2]

The present cases are but the most recent examples of the recurring conflict which, almost since the treaties were signed, has surrounded off-reservation fishing rights reserved by the Indians. For the most part, this controversy has reached the courts in the context of persistent attempts by the State of Washington to regulate its fisheries—or in some cases its failure to regulate non-treaty fisherman—in derogation of the Indians' treaty

[2]Each treaty contained a provision which in substance stated the following:

> The right to take fish, at all the usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory. . . . [Treaty of Medicine Creek, Art. III, 10 Stat. 1132]

rights.[3] In this instance, virtually the entire regulatory scheme of Washington's Departments of Fisheries and Game[4] was challenged by the tribes as violating their treaty rights.[5]

In the threshold opinion herein, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), Senior District Judge Boldt, after a lengthy trial during which extensive expert and lay testimony was taken, struck down those Washington laws and regulations which he found to discriminate against the Indians' treaty rights and to be unnecessary

[3]This Court first issued an opinion to protect the Washington Indians' off-reservation fishing rights over 70 years ago. United States v. Winans, 198 U.S. 377 (1905). Subsequently, the Court has had occasion to address the same conflict in numerous opinions. *See* Tulee v. Washington, 315 U.S. 681 (1942); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (*"Puyallup I"*); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (*"Puyallup II"*); Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) (*"Puyallup III"*). Moreover, this Court denied the petition for a writ of certiorari filed by the State of Washington to review the original decision of the Ninth Circuit in the *Washington* case, which affirmed Judge Boldt's holding. *See* United States v. Washington, 423 U.S. 1086 (1976), *rehearing denied*, 424 U.S. 978 (1976).

[4]In the State of Washington, the Department of Fisheries has jurisdiction to regulate salmon fishing while the Department of Game is responsible for regulating steelhead fishing. Both species are anadromous fish that traditionally were taken by the Indians and are the subject of the treaty rights.

[5]The State concedes that the treaty rights secure to the Indians the right of access to their fishing sites and freedom from paying a fee to the State for the privilege to fish. The State, however, has no choice but to make the concessions in light of the holdings in United States v. Winans, 198 U.S. 377 (1905) and Tulee v. Washington, 315 U.S. 681 (1942).

to perpetuate a particular species of fish or run.[6] Moreover, the Judge enjoined further actions of State authorities which violated the Indians' treaty rights.

Finally, in the absence of any reasonable allocation by the State, Judge Boldt quantified the Indians' off-reservation fishing rights. He found that the treaty language "in common with" meant sharing equally the opportunity to take fish. The district court concluded, therefore, that the treaty fishermen must have an opportunity to take 50% of the "harvestable" fish.[7] 384 F. Supp. at 343.[8]

As part of his comprehensive ruling, Judge Boldt promulgated an Interim Plan for a cooperative Indian/State fisheries management effort. 384 F. Supp. at 420. Additionally, a mechanism was established to facilitate out-of-court settlements of disputes between the parties.[9]

[6]Judge Boldt found that the "application of current laws and regulations of the State to restrict the time, place, manner and volume of off-reservation harvest of anadromous fish by treaty tribes is unlawful for the reasons that, a) they have not been established to be necessary to preserve and maintain the resource; b) they operate to discriminate against the tribes' treaty right to fish; c) they have been adopted and enforced in violation of appropriate standards; and, d) they have been adopted and enforced in derogation of the meaning and purposes of the treaty provision at issue in this case." 384 F. Supp. at 403.

[7]As noted earlier, the same conclusion was reached by Judge Belloni in 1969 in the treaty fishing rights case to which *amicus curiae* was a party. Sohappy v. Smith, 302 F. Supp. 899 (D. Ore., 1969).

[8]An important distinction must be made regarding precisely which fish are included in this right. The treaty fishermen have the right to take 50% of the harvestable runs which ordinarily pass by their usual and accustomed fishing sites. They do not have the right to 50% of the anadromous fish in Washington's waters.

[9]A Fisheries Advisory Board, which is composed of representatives of the State and the Indians, was formed to hear and resolve technical disputes between them arising out of the Judge's order.

Almost before the ink was dry on Judge Boldt's order, however, efforts were undertaken to circumvent his ruling. Two state court actions, initiated by private organizations comprised of non-treaty fishermen, led to injunctions prohibiting Washington's Department of Fisheries from regulating the fisheries in the manner necessary to carry out Judge Boldt's order.[10]

These rulings resulted in massive non-compliance with the federal orders, which necessitated further relief by Judge Boldt to protect the exercise of the treaty rights, including a number of restraining orders enjoining non-treaty fishermen from fishing in violation of such rights. Specifically, when the Washington Supreme Court held in *Gillnetters* that State authorities could not allocate fish between treaty and non-treaty fishermen, Judge Boldt undertook to supervise the allocation. Furthermore, when the State specifically refused to regulate non-treaty fishing in a manner calculated to protect the treaty rights, Judge Boldt enjoined non-treaty fisher-

[10]These actions ultimately resulted in the Washington Supreme Court decisions now before this Court on review in No. 77-983. The first case, Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wash. 2d 276, 571 P. 2d 1373 (1977) ("*Vessel*") was filed in the Thurston County Superior Court in 1974. The second action, Puget Sound Gillnetters Association v. Moos, 88 Wash. 2d 677, 565 P.2d 1151 (1977) ("*Gillnetters*"), was filed directly in the Washington Supreme Court. The *Gillnetters* opinion held that Washington's officials had no statutory authority to issue regulations to implement the federal district court's allocation ruling. In *Vessel*, the court determined that the Indians' treaty rights, as interpreted by Judge Boldt, denied non-treaty fishermen the equal protection of the law.

In light of the position taken by the State of Washington in the cases now being reviewed by this Court, *amicus curiae* cannot let pass unmentioned the essentially collusive nature of the state actions. Specifically, the State, a defendant in those cases, adopts precisely the same legal position as its "opponents", the plaintiffs.

men from fishing in violation of those rights.[11] Finally, when the Chief Justice of the Washington Supreme Court ordered the State to open non-treaty fishing areas when consistent with State law, but without requiring the State to consider the effect on treaty rights, Judge Boldt enjoined promulgation of regulations authorizing such openings absent an opportunity for the district court to consider the effect on treaty rights.[12] In doing so, Judge Boldt specifically recognized the State's right to close a fishery when necessary to conserve the resource.

The various appeals from the district court orders were considered by the Ninth Circuit in *Puget Sound Gillnetters Ass'n v. District Court*, 573 F.2d 1123 (9th Cir. 1978), where the orders were upheld. This Court subsequently granted the petitions for writs of certiorari to review the Ninth Circuit's decisions and the decisions of the Washington Supreme Court in the *Vessel* and *Gillnetters* cases.

---

[11] On August 31, 1977, the district court entered an order explaining that the State was unwilling or unable to manage the fishing in conformity with the court's previous orders. The order specifically cited the State's 1977 Puget Sound commercial fishing regulations as ignoring entirely the district court's directives which previously had been issued to protect Indian treaty rights.

[12] The State's determined effort to evade the orders of the district court led Judge Goodwin, in writing for the majority in Puget Sound Gillnetters Ass'n v. District Court, 573 F.2d 1123 (9th Cir. 1978) to conclude:

> The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

573 F.2d at 1126.

SUMMARY OF ARGUMENT

The treaty fishing right at issue in this litigation was reserved by the Indians when large grants of land were made by them to the United States in the mid-nineteenth century. The property reserved was the same unfettered right to fish enjoyed by the signatory tribes before the treaties were negotiated. In light of the fundamental nature of the treaty right, as well as the manifest intent of the Indians to preserve off-reservation fishing, this Court historically has struck down efforts by the State and individuals to limit its exercise.

More recent opinions of the Supreme Court attest to the continuing validity of the foregoing decisions. Thus, the treaty opponents' contention that the treaties merely secured to the Indians a right of "equal access" to their traditional off-reservation fishing grounds cannot be supported. Furthermore, apart from the specific precedents of this Court, which negate this limited interpretation of the treaty right, the principles of Indian treaty construction require rejection of Washington's thesis.

Once beyond the erroneous threshold argument of the treaty opponents, their assertion that the State's regulatory scheme does not discriminate against the Indians' off-reservation treaty fishing right necessarily must fail. In short, to subject both treaty fishermen and non-treaty fishermen to the same controls is, in effect, to render the treaty meaningless and thus to deny the former class a vested right.

Under the established precedents of this Court, when the State's regulatory scheme conflicts with the treaty right, an allocation of the fisheries resource is entirely appropriate. Thus, the district court's order apportioning the harvestable catch is valid.

Finally, the district court's allocation of the resource does not violate the concept of equal protection of the law. The treaty rights are rooted in the original sovereignty of the Indian tribes and were specifically retained by them when portions of their territory were granted to the United States. The Constitutional principle of equal protection, which prohibits a discriminatory exercise of power by the federal government, has no application to this case.

ARGUMENT

I.

UNDER ESTABLISHED PRINCIPLES OF LAW, THE OFF-RESERVATION FISHING RIGHT RESERVED BY THE INDIANS MAY NOT BE LIMITED TO A MERE RIGHT OF EQUAL ACCESS TO THEIR TRADITIONAL FISHING SITES.

Fundamental to the examination of any Indian treaty is recognition of the principle that Indian tribes thereunder not only received commitments from the United States in exchange for land or peace, but also generally reserved existing rights from grants they made to the federal government. This Court first noted that principle with respect to the specific treaty provisions here at issue over 70 years ago. *United States v. Winans*, 198 U.S. 377 (1905). In holding that the off-reservation fishing right was a reservation of rights not granted, the Court noted that "[t]he right to resort to the fishing places in controversy was part of larger rights possessed by the Indians, *upon the exercise of which there was not a shadow of impediment.*" (Emphasis added.) *Id.* at 381.

This, then, is the nature and scope of the off-reservations treaty fishing right retained by the Indians—a reserved right unencumbered by "a shadow of impediment." Moreover, the rights of non-treaty fishermen stem

from what the tribes granted to the United States and are, therefore, not a limitation upon what was reserved by the Indians.

A. The Supreme Court consistently has blocked attempts by non-treaty agencies and individuals to limit the off-reservation fishing right of the Washington Indians.

The above-described principle has provided the legal basis for a line of Supreme Court cases rejecting efforts to limit the scope of the off-reservation treaty fishing right. First, the Court in *Winans* rejected the argument that the Indians could be denied access to their traditional fishing sites because the property had passed into non-Indian ownership. The Court recognized that "no other conclusion would give effect to the treaty." 198 U.S. at 381. Similarly, in *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), the term "usual and accustomed places" was held by this Court to mean *all* "usual and accustomed places" at the time of the treaty, whether or not within an area ceded by the tribes. The Court, in refusing to allow the term to be arbitrarily limited, noted that it was "unnecessary to add much to what was said by this Court in [*Winans*] . . . ." 249 U.S. at 198. Finally, in *Tulee v. Washington*, 315 U.S. 681 (1942), the Court held that an "exaction of fees as a prerequisite to the enjoyment of [off-reservation treaty] fishing. . . cannot be reconciled with a fair construction of the treaty." 315 U.S. at 685.

Moreover, the continuing validity of the foregoing principle of treaty analysis has been acknowledged explicitly in the more recent opinions of the Supreme Court. *See Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Antoine v. Washington*, 420 U.S. 194

(1975).[13] In *Puyallup I* this Court quoted with approval from the *Winans* opinion as follows: "To construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' (198 U.S. at 380, 49 L.Ed. at 1092) would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more'." 391 U.S. at 397. Thus, contrary to the assertions of the State of Washington, under the still valid principle that the treaty right was an unqualified reservation by the Indians, as established in *Winans* and specifically affirmed in *Puyallup I*, "[t]he right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State. . . ." 391 U.S. at 398.

B. The meaning attributed by the State to the treaty provision concerning off-reservation fishing violates well-recognized principles of Indian treaty construction.

The interpretation of the Indians' off-reservation fishing right advanced by the State of Washington not only violates the specific principles established by this Court with respect to these treaty provisions, but also is inconsistent with more general principles of Indian treaty interpretation. First, the State's construction offends the rule established in *Choctaw Nation v. United States*,[14]

[13] In Antoine v. Washington, 420 U.S. 194 (1975), a treaty provision securing the right to hunt "in common with all other persons" was at issue. The State argued, as it does here, that the "in common with" language secured only the right of equal access with non-treaty hunters to the hunting ground. The Court, citing *Winans* and noting that such an interpretation would mean essentially nothing was secured to the Indians by the treaty provision, specifically denied the validity of the assertion.

[14] 119 U.S. 1 (1886).

and recognized in *Winans*, that a treaty is to be interpreted as the Indians would have understood it.[15] In applying this rule, the Court has declared that: "How the treaty [was] understood may be gathered from the circumstances." *United States v. Winans*, 198 U.S. at 381.

The circumstances attendant to the reservation of off-reservation fishing rights are no secret. For the tribes of the Columbia River and western Washington, fish were a critical resource and the right to fish a key to their survival. As this Court noted in *Winans*, "[t]he right [was] not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381.

The treaty opponents, nevertheless, persist in arguing that the Indians reserved only a limited right of equal access with non-treaty fishermen to traditional fishing grounds and, in addition, that the tribes waived any further assurances that their pre-existing rights would be protected. This assertion not only violates the aforementioned rule for treaty analysis, but also ignores common sense. Simple logic mitigates strongly against the con-

[15] The State and other treaty opponents make much of an intricate legal concept regarding ancient common law principles of common fisheries which secured equal rights to all citizens to fish common areas. Without citing a shred of evidence that the concept was discussed with, or explained to, the Indians, the State baldly asserts that this concept was encompassed by the term "in common with." The argument, stripped to its essence, is merely another way of stating the discredited notion that the treaty secured only "equal access" to the Indians.

Judge Boldt noted, however, that the treaties were negotiated in "Chinook Jargon," a simple language with but 300 words in its vocabulary and, according to the District Judge, incapable of expressing complex concepts. 384 F. Supp. at 330. Under the principles of Indian treaty construction discussed in the text, therefore, the State's elaborate theory of common fisheries should be ignored—as it has been on previous occasions by this Court.

clusion that the Indians knowingly and willingly would so completely jeopardize their most important subsistence resource.

Moreover, even if the circumstances calling for the foregoing conclusion were not so apparent, under a concomitant principal of treaty interpretation, ambiguities in treaties with Indians must be construed to their advantage. *United States v. Winans*, 198 U.S. at 380-381; *Antoine v. Washington*, 420 U.S. 194 (1975); *Choate v. Trapp*, 224 U.S. 665 (1912). As the Court of Appeals for the Ninth Circuit pointed out in *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975):

> This principle is somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes. The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian—a status accompanied by fiduciary obligations. [Citations omitted.] While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations.

532 F.2d at 660. Accordingly, the term "in common with" cannot be given the narrow, prejudicial construction advocated by the State and its supporters.

In summary, off-reservation treaty fishing rights were reserved by the Indians, free from any impediment. This

Court, in an unbroken line of cases, has prevented limitations from being placed on those rights except in narrowly prescribed circumstances not present here. The above-cited decisions reject the restrictive interpretation of the treaty right advanced by the State of Washington and non-treaty fishermen. Moreover, general principles of Indian treaty construction dictate that the interpretation advocated by the State be found invalid.

II.

THE STATE OF WASHINGTON'S DISCRIMINATORY REGULATION OF THE INDIANS' OFF-RESERVATION TREATY FISHING REQUIRES ALLOCATION OF THE HARVESTABLE FISH TO PROTECT THE TREATY RIGHT.

In determining which competing user group may benefit from its fisheries resources, the State of Washington has acted upon the premise that Indians engaged in off-reservation fishing are entitled to no greater right than "equal access". By adopting this interpretation of the treaty right and by regulating the fisheries consistent with that interpretation, the State of Washington cannot avoid, and, indeed, has not avoided, discriminating against the Indians' off-reservation fishing rights.

A. State fishing regulations cannot discriminate against off-reservation treaty fishing rights, and may affect those rights only when necessary to conserve the resource.

The unimpeded right of the Indians to take fish may be qualified by the State only under narrowly prescribed circumstances. *Puyallup I*, 391 U.S. at 399. When necessary to preserve a specific run or species of fish from complete extinction, the State may regulate the fisheries under "appropriate standards" even if the regulation has

an impact on the treaty right.[16] This Court has defined the "appropriate standards" requirement explicitly as meaning that "the State must demonstrate its regulation is a reasonable and necessary conservation measure, *Washington Game Department v. Puyallup Tribe*, 414 U.S. 44, 38 L.Ed. 2d 254 (1973); *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115 (1942), *and* that its application to the Indians is necessary in the interest of conservation." (Original emphasis.) *Antoine v. Washington*, 420 U.S. at 207.

In other words, the State may regulate the treaty right directly only when the preservation of a species or run is impossible under Washington's authority to regulate non-treaty fishing. Stated yet another way, "[t]he measure of the legal propriety of those kinds of conservation measures is . . . distinct from the federal constitutional standard concerning the scope of the police power of the state." *Puyallup I*, 391 U.S. 402 n. 14.[17]

---

[16]In Tulee v. Washington, 315 U.S. at 684, the State of Washington argued that, since its license laws applied equally to all fishermen, they did not discriminate against the Indians. In striking down this argument, the Court noted that the State could impose only those "purely regulatory" restrictions "concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish.*" (Emphasis added.)

[17]The brief of respondent Washington State Passenger Fishing Vessel Association argues that the State has full authority to regulate off-reservation fishing rights unencumbered by any limitation. In taking this position, respondent relies upon the statement in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149 (1973) that "[a]bsent express federal law to the contrary" State law may govern the off-reservation activities of Indians. Inexplicably ignoring the fact that treaties are federal laws, respondent concludes that the State "possesses full government powers over the treaty tribes off reservations." Brief of Respondent Washington State Commercial Passenger Fishing Vessel Association, at 19.

The regulatory scheme of the State under review in this case, however, makes no concession to these principles. Petitioner argues that it must be allowed "to apply its conservation regulations without distinctions between treaty and non-treaty fishermen." Brief of the State of Washington, at 113. Thus, the State has promulgated regulations which pay no deference to Indian off-reservation treaty rights.[18] Under these circumstances, the district court had no choice but to allocate the resource.[19]

---

[18]Under the "access" interpretation advanced by treaty opponents, of course, the State can render the treaty right meaningless by merely regulating the access in such a manner that no fish are available when the traditional fisheries are open. Indeed, that is, historically, precisely what has happened. The district court specifically found that in the State of Washington "[a] principal method of limiting the commercial take from the salmon runs is limitation on the number of days when fishing is permitted" (384 F. Supp. at 389) and that the Department of Fisheries allowed non-treaty net fishing on salmon runs in some locations while closing treaty net fishing on the same runs. 384 F. Supp. at 393. Judge Boldt found further that the regulations of the Department "in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the . . .tribes' usual and accustomed fishing places. . . ." *Id.* Finally, the district court determined that the regulation of the Department of Game prohibited treaty net fishing, even while admitting such fishing would not necessarily be detrimental to the run, but would be detrimental to steelhead sports fishing (384 F. Supp. at 393), and that the Department "has no idea" where the Indians usual and accustomed fishing places are and has never attempted to determine where they are. 384 F. Supp. at 395.

Moreover, the Ninth Circuit, in upholding the district court, recognized that the State of Washington lawfully could not deny fish to the treaty Indians, but noted: "Nevertheless this is precisely how the State of Washington has regulated fishing for years. In treating Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantee nugatory." United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975).

[19]The district court found that the State not only has engaged in *de jure* discrimination against the treaty rights, but also

[footnote continued]

B. When State regulations conflict with treaty rights, allocation of the harvestable catch is a necessary and appropriate remedy.

On previous occasions the Supreme Court impliedly has confirmed that, under circumstances such as those present in this case, an apportionment of the fisheries resource is an entirely appropriate remedial device. In *Puyallup II*, for example, this Court specifically required that the steelhead on the Puyallup River "be fairly apportioned" when it determined that Washington's regulatory scheme discriminated against the Indians' off-reservation treaty right. *Puyallup II*, 414 U.S. at 48.

Under the discriminatory regulatory scheme at issue here, therefore, the allocation of fish between the treaty and non-treaty fishermen prescribed by the district court is necessary and appropriate. Moreover, the district court's allocation of the entire resource is appropriate and consistent with this Court's rulings.

The resource to be apportioned, anadromous fish, are mobile species. As they follow their life cycles, the salmon and steelhead runs pass the Indians' fishing sites only at certain times of the year. At other times, these same fish are available to a variety of commercial and non-commercial fishermen. If only fish which pass the Indians' fishing sites are considered in the allocation, the fishing may be managed so that few, if any, harvestable fish pass the Indians' fishing grounds.[20]

---

has been guilty of *de facto* discrimination. Judge Boldt, for example, found that State authorities wrongfully seized fishing gear and fish from treaty fishermen (384 F. Supp. at 388), and retained for unreasonable periods of time or disposed of fishing gear owned by treaty fishermen without proper notice of proceedings for such acquisition. *Id.*

[20] In a clearly relevant converse holding and in a marked departure from its previous rulings, this Court decided in *Puyallup III*

[footnote continued]

This is the inescapable conclusion reached by the district court below. Moreover, the same conclusion was reached by the district court in *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969). Faced with the discriminatory practices of the States, these district courts each ordered allocation of 50% of the entire fishery resource to the treaty Indians to ensure that their rights were protected.

Although this Court has not specifically established a rule governing allocation of fish, its decisions consistently have supported the actions of the district courts. In *Puyallup III* the Court, while not ruling directly on the validity of the precise figures, upheld a Washington trial court's 45% treaty/55% non-treaty allocation of steelhead.[21] *Puyallup III* 433 U.S. at 177. The relatively minor disparity between the numbers explicitly sanctioned by the Supreme Court, and the numbers deemed appropriate by the two district courts, hardly seems a basis to strike down the 50% allocation mandated here.

---

that the regulatory authority of the State extends to on-reservation treaty rights, but that it does so under the same strict "appropriate standards" applicable to off-reservation rights. Significantly, the fundamental reason for the ruling was the mobile nature of the fish. The Court reasoned that, if the State could not regulate for purposes of conservation on the reservation as well as off, the Indians, because the reservation was at the mouth of the river, could frustrate the regulatory jurisdiction of the State by taking every fish passing through the reservation before it reached the spawning grounds. In the instant case, the State demands authority to do to the Indians what this Court has said the Indians cannot do to the State.

[21] The Court's ruling applied only to allocation of the natural run of steelhead. Not properly before the Court, and therefore not considered, was the question of allocating the hatchery run.

III.

AN ALLOCATION OF 50% OF THE HARVESTABLE CATCH TO TREATY INDIANS DOES NOT VIOLATE THE CONSTITUTIONAL PRINCIPLE OF EQUAL PROTECTION OF THE LAWS.

In *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wash. 2d 276, 571 P.2d 1373 (1977), the Supreme Court of the State of Washington ruled that the director of the Department of Fisheries has no authority to apportion the fishery to comply with the district court's order because such action would violate the Constitutional principle of equal protection of the laws. Specifically, the equal protection argument utilized by the Washington Supreme Court and advanced by parties here is based on the following reasoning: (1) in treaties with intervenors, the United States guaranteed to the Indian tribes a right to catch fish at their usual and accustomed fishing grounds in common with other citizens of the states; (2) the district court has interpreted the treaty provisions to mean that the tribes must be assured an opportunity to take up to fifty percent of the harvestable stock;[22] and (3) the district court's interpretation awards to a minority of the fishermen a disproportionate share of the fishing rights and, in doing so, causes the federal treaties in question to come into conflict with the Constitutional principle of equal protection of the laws.

---

[22]Harvestable stock was defined by the district court as follows:

> As used above, "harvestable" means the number of fish remaining to be taken by any and all fishermen, at usual and accustomed grounds and stations after deducting the number of fish required for spawning escapement and tribal needs. [384 F. Supp. at 343.]

Appellant's reasoning is fatally flawed because it is based on a complete misconception of the nature of Indian fishing rights analyzed earlier in this brief. As the discussion above demonstrates, the nature of that right can be summarized as follows:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. *In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted.* [Emphasis added.] [*United States v. Winans*, 198 U.S. at 381.]

The fishing rights at issue in the present case plainly were not granted to the Indians by the United States. To the contrary, prior to the time treaties were executed, the Indian tribes possessed an exclusive right to fish. Under the treaties, the Indians chose to relinquish a portion of their rights to non-Indians. Thus, in the end this case involves a reservation of governmental powers by Indian tribes rather than the federal government.

For this reason petitioners' discussion of the requirements of equal protection is totally inappropriate. The Constitutional principle of equal protection prohibits the United States from conferring in a discriminatory manner benefits over which it has exclusive power. Indian fishing rights, however, are not among the benefits which the federal government conferred in the treaties.

Treaty provisions relating to such rights, therefore, do not represent action by the United States. Accordingly, the Constitutional principle of equal protection, which prohibits a discriminatory exercise of power by federal or state government, has no application to the present case.

Even if the principle of equal protection were legally relevant, its application in this case provides no support for the State of Washington's position. Specifically, the *Vessel* court's decision and the treaty opponents' argument are based on a misconstruction of the requirements of the Constitutional principle of equal protection of the laws. The principle has been interpreted to necessitate only that ". . . those in the same class be treated with equality." *Caskey Baking Co. v. Commonwealth of Virginia*, 313 U.S. 117 (1941). *Accord, Cunningham v. United States*, 256 F.2d 467, 473 (5th Cir. 1958).

The two classes created by the federal treaties in question consist, respectively, of certain persons--Indians--who have been guaranteed fishing rights, and certain other persons--non-Indians--with whom the rights must be exercised in common. Under the district court's interpretation of the treaty, each class is entitled to receive half of the benefits involved. All class members, therefore, have been accorded equal treatment. No authority has been cited, and *amicus curiae* knows of none, which holds that a court must go still a step further and apportion such rights strictly on the basis of population.

Furthermore, as this Court has emphasized in prior decisions, distinctions between Indians and non-Indians such as those at issue here are, in the final analysis, not a racial classification, but, instead, are attributable to the

quasi-sovereign political status which Indian tribes historically have enjoyed. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court upheld a federal law mandating the preferential hiring of Indians by the Bureau of Indian Affairs and, in doing so, noted explicitly that the employment preference was not racially based, but was derived from the unique political relationship between the United States and Indian tribes. Moreover, in *Regents of the University of California v. Bakke*, ———*U.S.*———, 57 L. Ed.2d 750, 780 n. 42 (1978), the Court explicitly reaffirmed its *Mancari* analysis.

Finally, this Court's recent actions with respect to *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978), support the aforementioned conclusions. In *Wilson*, defendants, among other arguments, challenged on equal protection grounds, 25 U.S.C. § 194, which provides that, in property disputes involving Indians and non-Indians, the non-Indian parties carry the burden of proof. The United States Court of Appeals for the Eighth Circuit, relying upon the *Mancari* decision, rejected defendants' argument. Significantly, although the Court granted the petition for a writ of certiorari in the *Wilson* case, petitioners' equal protection argument was excluded explicitly from consideration. *See* 47 U.S.L.W. 3332 (U.S. S. Ct., November 13, 1978).

CONCLUSION

Contrary to the assertions of the State of Washington and consistent with the prior decisions of this Court, the off-reservation fishing right reserved by the Indian tribes which are parties to the present action may not be limited to a mere right of equal access to their traditional fishing sites. Furthermore, the State of Washington's persistently discriminatory regulation of the Indians' off-

reservation treaty fishing right requires an allocation of the harvestable fish in order to protect the right. Finally, an allocation of 50% of the harvestable catch to treaty Indians does not violate the Constitutional principle of equal protection of the laws.

In light of the foregoing, *amicus curiae* Nez Perce Tribe of Idaho urges that the Court of Appeals' decisions in Nos. 78-119 and 78-139 be affirmed and that the decisions of the Washington Supreme Court in No. 77-983 be reversed.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

ROBERT C. STROM
120 West Main
Craigmont, Idaho 83523
Attorneys for Amicus Curiae.

Of Counsel:
W. RICHARD WEST, JR.
LEROY W. WILDER